IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1122 of 1992
With
CRIMINAL APPEAL No. 1287 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VINUBHA BALVANTSINH SOLANKI & 3 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KJ SHETHNA for Appellant(s) : 1 - 4.
MS FALGUNI PATEL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 30/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE SHARAD D.DAVE)

1. Criminal Appeal No.1122 of 1992 is directed against the judgment and order of conviction rendered by the learned Additional Sessions Judge, Ahmedabad (Rural) in Sessions Case No.84 of 1991 on 25th September, 1992 convicting the appellants, i.e., appellant No.1 for the offence under Section 302 of IPC and sentenced him to undergo RI for life, appellant No.2 for the offence under Section 326 of IPC and sentenced him to undergo RI for 6 years and fine of Rs.2000/-, in default, SI for 6 months, appellant Nos.3 and 4 for the offence under Section 325 of IPC and sentenced them to undergo RI for 4 years and fine of Rs.1000/- each and in default, SI for 4 months. The appellant Nos.1 to 4 are also convicted for the offence under Section 135 of B.P.Act and sentenced them to undergo RI for 6 months and fine of Rs.5000/- each, in default, RI for 2 months and all substantive sentences were ordered to run concurrently.

2. Criminal Appeal No.1287 of 1992 filed by the State is directed against the judgment and order of acquittal rendered by the learned Additional Sessions Judge, Ahmedabad (Rural) in Sessions Case No.84 of 1991 on 25th September, 1992 against original accused Nos.2, 3 and 4 for the offence under Section 302 of IPC read with Sections 149 and 34 of IPC. No appeal is filed by the State against the original accused

not.5 i.e. Lamxansinh Gandaji.

3. The case of the prosecution in brief is that a complaint came to be filed by Kanuji Laxmanji before Detroj Police Station on 11.11.1990 to the effect that he is residing near Railway crossing in Rampura village of Viramgam Taluka with his family. Prior to three years of the complaint, his father – deceased Laxmanji was prevented from entering the village Rampura by order of the Court and used to come to meet his family members. Prior to the day of the incident, his father came and stayed there. At about 4.00 O'clock in the evening, when his father, mother Kanuben and his sister Jijiben were sitting near hutment, four persons came from village Bhankoda side and two persons came from village Rampura. One of the persons coming from Rampura was Jenaji Gandaji who was armed with Dhariya and the complainant could not identify the other person, but he was armed with stick. Out of the persons coming from Bhankoda, accused No.1 Vinuji Balwantsinh was armed with Dhariya, accused No.2 Jenaji Chhatrasinh was armed with Dhariya, accused No.3 Bhikhuji Keshrisinh was armed with stick and the fourth person was unidentified who was armed with stick. On seeing them, his father got frightened and started running. It is stated that the accused have cordoned the father of the complainant and started beating him and he succumbed to the injuries. After sometime, Thakor Galabji Bhalaji of village Kanz advised the complainant to give the complaint and accordingly,

the complainant gave the compliant before Detroj Police Station on 11.11.1990 and Police Sub Inspector Juvansinh Galabsinh who was on duty registered the complaint being CR No.89 of 1990 for the offence punishable under Sections 302, 147, 148, 149 of IPC and Section 135 of B.P.Act.

4. On completion of investigation, chargesheet came to be filed in the court of learned JMFC, Viramgam. As the offences are exclusively triable by the Court of Session, the case is committed to the Court of Sessions, Ahmedabad (Rural) at Ahmedabad.

5. The charge came to be framed against the present appellants and acquitted accused to which they pleaded not guilty and claimed to be tried. Learned Sessions Judge, recorded the statements of the accused under Section 313 of the Code of Criminal Procedure, 1973 and after recording the evidence led by the prosecution and the defence and after hearing both the learned advocates for the parties, passed the judgment and order and convicted the appellants and acquitted accused No.5 as stated above, which gave rise to both these appeals.

6. Learned advocate Mr.K.J.Shethna appearing for the accused submitted that time gap between inquest and dead body received in the hospital for postmortem is not explained. This aspect has not been considered by the trial Court and, therefore, benefit of doubt may be given to the appellant which has been

refused by the trial Court. It is further submitted by Mr.Shethna, learned advocate that accused No.1 was the last person to give blow and there was no intention on the part of the accused No.1 to inflict the injury which may result into the death of the deceased and, therefore, the case would fall under Section 304, Part-II. In the aforesaid circumstances, this appeal may be allowed and judgment and order may be set aside.

7. On the other-hand, learned A.P.P.Ms.Patel submitted that the trial Court has considered all the aspects while recording conviction and, therefore, the appeal may be dismissed.

8. We have heard learned advocate Mr.K.J.Shethna and Ms.Falguni Patel, learned APP for the respective parties and have gone through the record and proceedings of the trial Court.

9. It can be seen from the record that the prosecution, in order to prove its case, has examined the following witnesses.

PW 1, Bashir Mohammad Fakir Mohammad Malek, Exh.13, Circle Inspector, who prepared the map of scene of offence.

PW 2, Kanuji Laxmanji, Exh.16, Complainant and the son of the deceased.

PW 3, Javanji Meruji, Exh.17, Panch Witness of the panchnama of scene of offence.

PW 4, Bharatsinh Natwarsinh, Exh.22, Second Panch Witness of the panchnama of scene of offence.

PW 5, Dr.Kiritbhai Jayantibhai Patel, Exh.23 who performed the postmortem of the deceased.

PW 6, Kanjibhai Maljibhai, Exh.25, Panch Witness

PW 7, Vaghubha Sardarsinh Exh.26, Panch Witness

PW 8, Dalsukhbhai Harilal Mehta, Exh.27, Panch Witness.

PW 9, Hasmukhlal Vadilal Doshi, Exh.31, Executive Magistrate before whom identification parade was conducted.

PW 10, Kamuben Laxmanji, Exh.34, Wife of the deceased.

PW 11, Jijaben Laxmanji, Exh.35, Daughter of the deceased.

PW 11, Velaji Galabji, Exh.37.

PW 12, Juvansinh Gulabji, Exh.38, Investigating Officer.

10. The prosecution also produced various documentary evidence in support of its case.

11. It can be noticed from the record that Dr.K.J.Patel, who has performed the postmortem of the deceased has been examined at Exh.23. He has stated in his deposition that Police Constable Buckle No.1277 had brought the dead body of the deceased Laxmanji Nathaji for postmortem at about 4.30 in the morning on 12.11.1990. He stated that the postmortem was started at 7.30 in the morning and was completed at 8.30 in the morning. He has stated the injuries were seen on the dead body of the deceased in the postmortem report and out of the said injuries, injury nos.1,2,3,6 and 7 were of grave in nature, whereas injury nos.4 and 5 were simple in nature and it is also stated that injury no.1 has been caused by sharp cutting weapon. He further stated that injury no.1 was sufficient to cause the death of the deceased. According to the said witness, injury nos.1 to 7 were also sufficient to cause the death of the deceased.

12. Looking to the evidence of the Doctor who performed the postmortem of the deceased, it is proved that the death is homicidal.

13. It can also been seen from the record that the complainant Kanuji Laxmanji has described the incident in his deposition and as to the reason of the incident, he stated that before about four years of the incident, Thakore people had committed loot in their house and also set their house on fire and a complaint to this effect was also filed. Therefore, keeping a grudge of this, the accused had attacked the deceased and killed him. This witness is an eye witness to the incident and son of the deceased. He has clearly stated the names of the appellant nos.1 to 3 and also the role played by them in the incident. However, he has stated of not knowing the name of appellant no.4.

14. PW 10, Kamuben Laxmanji who is the widow of the deceased has been examined at Exh.34 who has described the incident. She also identified the appellants in the Court. She is also an eye witness to the incident and she also stated the names of the appellants and their roles in the incident. So is the case of Jijiben Laxmanbhai who is the daughter of the deceased who has also described the incident. She identified Bhikhusinh, Vinubha and Jenubha in the Court. PW 11, Velaji Galabji is also examined at Exh.37. It also comes out from his deposition that when he was passing from Dekavala road, he heard cries of some body and when he went there, he saw six persons running away. He states these persons to be Vinubha, Balvantsinh, Bhikhusing Kesrisinh, Jenaji Gandaji and Bodhaji Gandaji. He did not identify the

sixth person. He identified the appellants in the Court. He stated appellant no.1 – Vinubha Balvantsinh having Dharia, Bhikhusinh Kesrisinh having stick, Jenaji Chhatrasinh having dharia, Bodhaji Gandaji having stick and Jenaji Gandaji having dharia with them and the sixth person was having a stick with him.

15. In the deposition of all the four eye witnesses, the names of appellant nos.1 to 3 and the roles played by them in the incident are stated by them. A bare perusal of the postmortem report coupled with the evidence of the Doctor who performed the postmortem of the deceased makes it clear that injuries sustained by the deceased were sufficient to cause the death of the deceased and the said injuries were sustained because of the blow given by the accused No.1 with dharia. Further, these witnesses cannot be said to be chance witnesses as if the incident has occurred in a verandah and some body was passing over by and saw the incident. These eye witnesses are the relatives of the deceased and the incident has taken place in the own field of the deceased and there was hut built in the field to take care of the field and it is natural that he, along with the family members, must have been sitting over there in the hut.

16. With regard to the injuries sustained by the deceased, if the deposition of the doctor is perused, the doctor has stated in his deposition that the

injury no.1 is sufficient in the ordinary course of nature to cause the death of a person. This injury no.1 is possible by any sharp cutting weapon and it is proved in the evidence of four eye witnesses as stated above that this injury no.1 is caused by the dharia blow given by the appellant no.1 Vinubha Balvantsinh. Further, learned Sessions Judge, after appreciating the evidence on record, has come to the conclusion that accused No.1 has inflicted the injury with dhariya on the head of the deceased and as per the medical evidence, the same was sufficient to cause the death of the deceased and held accused No.1 guilty for the offence punishable under Section 302 of IPC.

17. We have given our thoughtful consideration to the situation and in our view when the version given by the Doctor as to the case history gets support by contemporaneous record, there would be no justification in giving undue weightage to the discrepancy in timing, once we find that the witness is reliable. It has come in evidence that the deceased was brought to the hospital at 4.30 a.m., on 12.11.1990. This witness has been tested on touch stone of cross-examination and despite scrutiny, we are unable to find nor any material is shown to us to render the deposition of the doctor doubtful. It is to be remembered that the doctor is independent witness who would have no interest in the ultimate outcome of the case. The time gap is not such so would affect the trustworthiness of the witness. It

cannot render the entire prosecution story unbelievable. We are, therefore, inclined to accept the evidence of the doctor overlooking the minor discrepancy regarding the timing.

18. Once we accept the doctor's deposition supported by medical case papers, the conviction of the appellant No.1 for the offence of murder has to be upheld and we do so hereby.

19. Looking to the evidence on record, in our view, the trial Court is justified in convicting the appellant no.1 for the offence under Section 302 of the Indian Penal Code as the injury by which the death of the deceased occurred was inflicted by the appellant no.1 and the appellant no.2 for the offence under Section 326 of the IPC as he inflicted the dharia blow on the leg of the deceased and caused him grievous hurt. Further, the trial Court is also justified in convicting the appellant nos. 3 and 4 for the offence under Section 325 of the Indian Penal Code as he caused injuries by stick to the deceased. Evidence led by the prosecution fails to establish existence of unlawful assembly. Attempt to involve accused no.5 is apparent and, therefore, the trial Court was justified in holding that unlawful assembly is not established. We cannot reject evidence in respect of other accused for the reason that it gets corroboration from medical evidence. The eye witness's version is also consistent except a minor discrepancy as to sequence of blows. This discrepancy

is not good enough to discard the evidence in toto.

20. We find substance in finding of the trial Court that existence of unlawful assembly is not established from the prosecution evidence. It has also come on record that external injury no.1 was fatal and was caused by accused no.1. The other non-fatal injuries are attributed to other accused nos.2,3 and 4. They cannot be convicted under Section 302 read with 149 of Indian Penal Code in view of the evidence led by prosecution. The state appeal has to, therefore, fail.

21. As far as the contention of Mr.Shethna that the offence falls under Section 304, Part II and not under Section 302, it is pertinent to note at this stage that the complainant has stated in his deposition that these accused had caused harm to the deceased in the past and a complaint to this effect was filed by the deceased because of which there was an order from the competent court not to enter this village, but the deceased used to come sometime to visit the family. On the day of the incident, he had come to visit the family and was sitting in the varandah when the accused persons came there suddenly and started inflicting blow with the weapons in their hands and, therefore, it cannot be said that there was any altercation, scuffle or fight between the accused and deceased and in a heat of moment, the incident has occurred. Therefore, there is no reason to accept the contention of Mr.Shethna.

22. Thus, the Criminal Appeal No.1122 of 1992 is dismissed. Conviction and sentence by the learned Additional Sessions Judge, Ahmedabad (Rural) in Sessions Case No.84 of 1991 by judgment and order dated 25.9.1992 is hereby confirmed.

23. Accordingly, the Criminal Appeal No.1287 of 1997 is also dismissed as the learned trial Judge is justified in acquitting the appellant nos. 2 to 4 for the offence punishable under Section 302 of the Indian Penal Code.

24. It has come on record that during the pendency of the appeal, original accused no.3 i.e.,Bhikhuji Kesrisinh has expired and, therefore, the appeal filed qua him stands abated.

25. Bail bonds of appellant Nos.2 and 4 stands cancelled. They are directed to surrender themselves forthwith.

(A.L.DAVE, J) (SHARAD D DAVE, J)

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Further order :

Learned advocate Mr.Mehta states that eight weeks time may be granted to appellant Nos.2 and 4 to surrender to custody to enable them to wind up their affairs. We have heard learned APP on this aspect. In the interest of justice, four weeks time is granted for appellant Nos.2 and 4 to surrender to custody.

(A.L.Dave,J)

(Sharad D.Dave,J)

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